RECORD
AND
BRIEFS

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No. 16-300

In the Supreme Court of the United States

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Ernst & Young LLP and Ernst & Young U.S. LLP. Petitioners are limited liability partnerships. They have no parent corporations, and no publicly held companies own 10% or more of their stock.

Respondents are Stephen Morris and Kelly McDaniel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 834 F.3d 975. The order of the district court granting petitioners' motion to compel arbitration (Pet. App. 43a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2016. The petition for a writ of certiorari was filed on September 8, 2016, and granted on January 13, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]

STATEMENT

This case presents an extraordinarily important question concerning the enforceability of agreements requiring employees and employers to arbitrate claims against one another on an individual, rather than collective, basis. Under the Federal Arbitration Act, arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. The question presented is whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Arbitration Act of arbitration provisions of the type at issue here.

Petitioners are Ernst & Young LLP and Ernst & Young U.S. LLP (collectively "EY"). Virtually all of EY's approximately 40,000 employees in the United States have agreed to an arbitration provision as a condition of employment, requiring all disputes with petitioners to be resolved in individual arbitration. Respondents are two of petitioners' former employees. Despite the arbitration provisions in their employment agreements, respondents filed a class action against petitioners in federal court, asserting claims under the Fair Labor Standards Act and California law. Petitioners moved to compel arbitration, and the district court granted the motion, holding that the arbitration provision at issue was enforceable.

A divided panel of the Ninth Circuit reversed. Over a lengthy dissent, the majority held that the arbitration provision violated the collective-bargaining provisions of the National Labor Relations Act and was thus unenforceable under the Arbitration Act. In so holding, the Ninth Circuit specifically rejected the mode of analysis this Court has established for evaluating a potential conflict between the Arbitration Act and another federal

statute, under which the other federal statute must contain a clear congressional command to override the Arbitration Act's express mandate to enforce arbitration provisions according to their terms. The Ninth Circuit's decision was incorrect, and its judgment should be reversed.

A. Background

1. Arbitration is an alternative form of dispute resolution that offers many benefits over traditional litigation. Arbitration allows the parties to design their own "efficient, streamlined procedures tailored to the type of dispute" at issue. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011). It produces "expeditious results." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). And it "reduc[es] the cost" of dispute resolution. *AT&T Mobility*, 563 U.S. at 345.

Despite those benefits, there was a long history of "judicial hostility" to arbitration. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974). That hostility dates from the English common law, which "traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason." *Id.* at 510 n.4. Judicial hostility to arbitration was "firmly embedded" in English law and carried over into American law. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). It "manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *AT&T Mobility*, 563 U.S. at 342 (internal quotation marks and citation omitted).

In 1925, Congress enacted the Federal Arbitration Act, 9 U.S.C. 1-16, to reverse the "old common-law hostility toward arbitration." *Southland Corp.* v. *Keating*,

465 U.S. 1, 14 (1984). In its primary substantive provision, Section 2, the Arbitration Act states that "[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

As this Court has repeatedly recognized, the Arbitration Act reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility*, 563 U.S. at 339 (internal quotation marks and citation omitted). Consistent with that understanding and Section 2's express mandate, "courts must rigorously enforce arbitration agreements according to their terms." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and citation omitted). That principle applies in the context of employment agreements. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 109 (2001). It applies in the context of agreements that require individual arbitration. See *AT&T Mobility*, 563 U.S. at 345-352. And it applies in the context of agreements to arbitrate federal statutory claims, unless "the [Arbitration Act's] mandate has been overridden by a contrary congressional command." *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012) (internal quotation marks and citations omitted).

2. This case presents a question at the intersection of the foregoing contexts: namely, whether an arbitration provision in an employment agreement that requires an employee to arbitrate claims on an individual basis is valid and enforceable under the Arbitration Act. Arbitration of employment disputes has long been routine for unionized employees, and it has become increasingly

common for non-unionized employees over the last fifty years. See Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83, 84 (1996).

The argument that arbitration provisions of the type at issue here are unenforceable relies on the National Labor Relations Act (NLRA). In enacting the NLRA in 1935, Congress found that "[t]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest." 29 U.S.C. 151. Accordingly, Congress sought to promote industrial peace by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Ibid.*

Of relevance here, Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. And Section 8(a) of the NLRA makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by Section 7. 29 U.S.C. 158(a). The NLRA does not contain any reference to class or other collective dispute-resolution procedures, whether in court or in arbitration.

B. Facts And Procedural History

1. Petitioner Ernst & Young LLP is an accounting firm serving clients in the United States; petitioner

Ernst & Young U.S. LLP is an affiliate of Ernst & Young LLP. Virtually all of EY's approximately 40,000 employees in the United States have consented to an arbitration provision as a condition of employment. The agreement between EY and those employees specifies that "[a]ll claims, controversies or other disputes between [petitioners] and an [e]mployee that could otherwise be resolved by a court" will instead be resolved through the Common Ground Dispute Resolution Program. J.A. 37.

The Common Ground Program is designed to "provide a fair, prompt, and cost-effective mechanism for resolving disputes" between EY and its employees. J.A. 36. The program has existed since 2002, with amendments not relevant here. *Ibid.* It expressly preserves an employee's right to file a charge with the Equal Employment Opportunity Commission or any other administrative agency. J.A. 47.

Under the Common Ground Program, dispute resolution proceeds in two phases. The first phase is mediation. To initiate mediation, the employee need only provide EY with notice in writing of a dispute and pay a fee equivalent to the fee for filing a lawsuit in a local court of general jurisdiction or the fee specified in the dispute-resolution provider's rules, whichever is less. EY pays the remaining fees and costs associated with the mediation. The employee then has the option of selecting among the available dispute-resolution providers to conduct the mediation. The employee is entitled to counsel in the mediation; if the employee chooses not to hire a lawyer (and is not himself a lawyer), EY will not use a lawyer either. If mediation does not resolve the dispute within 90 days, the process proceeds to the next phase unless the parties agree to an extension. J.A. 39-41.

The second phase of the Common Ground Program is binding arbitration. In that phase, "[c]overed [d]isputes pertaining to different [e]mployees will be heard in separate proceedings"; class or other collective proceedings are not permitted. The employee can initiate arbitration without paying an additional fee, and the employee again has the option of choosing the dispute-resolution provider and retaining counsel. EY pays the filing and administrative fees associated with the arbitration. The parties pay their own attorney's fees and split the arbitrator's fees and costs evenly, although EY will pay a larger portion of the arbitrator's fees and costs under certain circumstances. The arbitrator also has the authority to order EY to reimburse the employee's attorney's fees. J.A. 42, 44-46.

Both parties may take discovery, including "reasonable" document requests; three depositions of fact witnesses of each party's choosing; depositions of any expert witnesses designated by the other party; and additional discovery as necessary to ensure "adequate[]" arbitration of the claim. The arbitrator then holds a hearing in which the employee and EY present their cases through testimony and documentary evidence. The arbitrator's award is final and binding. J.A. 44-45.

2. Respondent Stephen Morris worked in the audit division of EY's Los Angeles, California, office from 2005 to 2007. Respondent Kelly McDaniel worked in the audit division of EY's San Jose, California, office from 2008 to 2011. During her tenure at EY, McDaniel became a licensed accountant. Both respondents agreed to resolve their employment-related disputes through the Common Ground Program. J.A. 17-18, 25-26; Pet. App. 45a.

3. In 2012, respondent Morris brought suit against petitioners in the United States District Court for the Southern District of New York on behalf of a nationwide

class of employees and a separate class of California employees, alleging that petitioners had misclassified the employees for purposes of overtime pay under the Fair Labor Standards Act (FLSA) and California law. Respondent McDaniel later joined the lawsuit as a named plaintiff. After the case was transferred to the Northern District of California, petitioners moved to compel arbitration. Respondents did not dispute that their claims were covered by the arbitration provision; they argued that the arbitration provision was unenforceable because, among other things, the collective-bargaining provisions of the NLRA conferred a nonwaivable right to collective litigation. J.A. 14; Pet. App. 45a, 50a.

The district court granted petitioners' motion to compel arbitration and dismissed the case. Pet. App. 43a-67a. As is relevant here, the court reasoned that it was required to "enforce the instant agreement according to its terms" because "Congress did not expressly provide [in the NLRA] that it was overriding any provision in the [Arbitration Act]," which embodies a "strong policy choice in favor of enforcing arbitration agreements." *Id.* at 66a-67a (first alteration in original) (internal quotation marks and citation omitted).

4. A divided panel of the court of appeals reversed and remanded. Pet. App. 1a-42a.

a. The court of appeals began its analysis by examining the NLRA. Pet. App. 3a-11a. Citing case law construing Section 7 of the NLRA, the court asserted that "Section 7 protects a range of concerted employee activity, including the right to seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 7a (internal quotation marks and citation omitted). According to the court, Section 7 thus establishes a "substantive right" for employees "to pursue work-related legal claims, and to do so together." *Id.* at

8a, 10a. The employment agreements' arbitration provision, the court of appeals determined, "prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else." *Id.* at 11a. As a result, the court reasoned, the provision "interfere[s] with a protected [Section] 7 right in violation of [Section] 8" of the NLRA and "cannot be enforced." *Ibid.*

Having not yet even mentioned the Arbitration Act, the court of appeals proceeded to dismiss it, stating that the Arbitration Act "does not dictate a contrary result." Pet. App. 12a. In the court's view, "[t]he illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum." *Id.* at 13a. Rather, "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*." *Id.* at 23a. Relying on the Arbitration Act's saving clause, which provides that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. 2, the court concluded that petitioners' arbitration provision was prohibited by the NLRA and thus was unenforceable. Pet. App. 16a, 24a.

In reaching that conclusion, the court of appeals recognized that the majority of circuits to have considered the issue had reached the opposite conclusion. Pet. App. 24a n.16. The court of appeals specifically rejected the mode of analysis underlying those courts' logic, which would require a "contrary congressional command" in a federal statute in order to override the Arbitration Act's mandate to enforce arbitration agreements. *Id.* at 17a.

b. Judge Ikuta dissented. Pet. App. 25a-42a. In her view, the majority's reasoning was "directly contrary" to this Court's arbitration jurisprudence. *Id.* at 25a.

Judge Ikuta began by observing that, "[c]ontrary to the majority's focus on whether the NLRA confers 'substantive rights,' in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express 'contrary congressional command' that overrides the [Arbitration Act]." Pet. App. 29a (citing *Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 565 U.S. at 98; and *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

Under that test, Judge Ikuta reasoned, the NLRA contained nothing "remotely close" to a "contrary congressional command" that would displace the Arbitration Act's clear mandate to enforce arbitration agreements according to their terms. Pet. App. 35a. The collective-bargaining provisions of the NLRA "neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively." *Ibid.* Nor do those provisions "expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively." *Id.* at 36a. In addition, Judge Ikuta found no support in the NLRA's legislative history or underlying purposes for the conclusion that the NLRA precludes enforcement of an agreement requiring disputes to be resolved in individual arbitration. *Id.* at 37a-38a.

Judge Ikuta proceeded to reject the majority's reliance on the Arbitration Act's saving clause. Pet. App. 38a-41a. At the outset, Judge Ikuta noted that this Court "does not apply the savings clause to federal statutes"; instead, unless the supposedly conflicting statute contains a congressional command contrary to the use of arbitration, it "can be harmonized with the [Arbitration Act]." *Id.* at 39a. She contended that the majority's reasoning was based on the erroneous premise that collec-

tive-action waivers are illegal, when in fact such a waiver "would be illegal only if it were precluded by a 'contrary congressional command' in the NLRA, and here there is no such command." *Id.* at 40a.

Judge Ikuta further reasoned that, even if the Arbitration Act's saving clause were applicable to federal statutes, it could not save the majority's construction of the NLRA as "giving employees a substantive, nonwaivable right to classwide actions." Pet. App. 40a. As she explained, such a purported right would "disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration.'" *Ibid.* (alteration in original) (quoting *AT&T Mobility*, 563 U.S. at 344). In *AT&T Mobility*, she added, the Court "expressly rejected" the reasoning behind the majority's conclusion that "the nonwaivable right to class-wide procedures [that the majority] has discerned in [Section] 7" complies with the Arbitration Act simply because it "applies equally to arbitration and litigation." *Ibid.*

Judge Ikuta concluded by observing that the majority's rule was "directly contrary to Congress's goals in enacting the [Arbitration Act]." Pet. App. 40a. She noted that "lawyers are unlikely to arbitrate on behalf of individuals when they can represent a class, and an arbitrator cannot hear a class arbitration unless such a proceeding is explicitly provided for by agreement." *Id.* at 40a-41a (citation omitted). As a result, "the employee's purported nonwaivable right to class-wide procedures virtually guarantees that a broad swath of workplace claims will be litigated" rather than arbitrated. *Id.* at 41a. The majority, in other words, "exhibit[ed] the very hostility to arbitration that the [Arbitration Act] was passed to counteract." *Ibid.*

SUMMARY OF ARGUMENT

I. This case concerns an alleged conflict between the Federal Arbitration Act, which mandates that arbitration agreements be enforced according to their terms, and the National Labor Relations Act, which respondents contend prohibits individual-arbitration provisions such as the one contained in the agreement between respondents and EY. To avoid arbitration according to the terms of their agreement, respondents bear the burden of demonstrating that the NLRA contains a clear command contrary to the Arbitration Act's command to enforce arbitration agreements according to their terms. They cannot do so.

A. Section 2 of the Arbitration Act provides that "[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Consistent with that clear directive, courts must enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes.

When two federal statutes are allegedly in conflict, courts must harmonize the statutes if they are capable of coexistence, absent a clearly expressed congressional intention to the contrary. In the specific context of the Arbitration Act, the Court has distilled that principle into a rule that the Arbitration Act's clear command to enforce arbitration agreements according to their terms will yield only when it has been overridden by a contrary congressional command in another federal statute. The burden of proving that a federal statute displaces the Arbitration Act is heavy. In fact, that burden has not

been met in any case in which the statute in question does not expressly prohibit arbitration. In every such instance, this Court has rejected litigants' attempts to avoid arbitration by asserting that another federal statute displaces the Arbitration Act.

B. This case is no different. Respondents cannot carry their burden of showing that Congress intended in the NLRA to override the Arbitration Act by precluding agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically. Nothing in the text of the NLRA demonstrates a congressional command contrary to agreements to arbitrate, much less agreements to arbitrate on an individual basis. Section 7 of the NLRA, which respondents invoke, contains no language about the availability of a judicial forum or collective dispute-resolution procedures in disputes between employers and employees. Nor does it refer to arbitration. Indeed, no provision anywhere in the NLRA guarantees a judicial forum or collective procedures for dispute resolution or disavows arbitration for resolving such disputes. Respondents rely on Section 7's residual clause, but its general language falls far short of the much more specific language in other statutes that this Court has held is still insufficient to demonstrate a congressional command contrary to the Arbitration Act.

The legislative history of the NLRA similarly lacks any indication of a congressional intent to preclude agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically. To the extent there was discussion of arbitration in the legislative history of the NLRA, it was primarily in the context of a proposal to have the National Labor Relations Board *conduct* arbitrations. There was no discussion whatsoever of a right to pursue claims on a class or other collective basis against employers—which makes sense, given

that the NLRA was enacted decades before the adoption of the modern class-action mechanism in the Federal Rules of Civil Procedure and years before the adoption of the collective-action mechanism in the Fair Labor Standards Act.

Nor can the underlying purposes of the NLRA be said to be in inherent conflict with individual arbitration. The principal purpose of the NLRA is to minimize industrial strife by encouraging self-organization and collective bargaining. To the extent the NLRA protects employees' rights, it does so not for their own sake but rather to serve that purpose. Moreover, federal labor policy has long favored and promoted arbitration in the collective-bargaining process. This Court has observed that the advantages of arbitration, including the use of efficient procedures that reduce the cost and increase the speed of dispute resolution, may be of particular importance in employment litigation. Nothing suggests that the underlying purposes of the NLRA are irreconcilable with individual arbitration. Because the statute evinces no clear congressional intent to supersede the Arbitration Act, the arbitration provisions at issue here must be enforced according to their terms.

II. In holding that employment agreements requiring the parties to arbitrate on an individual basis are unenforceable, the court of appeals relied on erroneous interpretations both of the Arbitration Act's saving clause and of the NLRA.

A. The saving clause of the Arbitration Act permits courts to withhold enforcement of an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. That clause applies where a generally applicable doctrine of contract law—which, with rare exception, is supplied by state, not federal, law—prohibits the enforcement of an arbitration

agreement. The saving clause thus "saves" generally applicable state-law contract defenses such as fraud, but not defenses that discriminate against or apply only to arbitration. By its terms, the saving clause does not apply where another *federal* statute allegedly discriminates against arbitration. And for good reason. Unlike the States, Congress is entitled to enact laws discriminating against arbitration; no "saving" is necessary. That explains why this Court has never relied on the saving clause to resolve an alleged conflict between the Arbitration Act and another federal statute.

The court of appeals attempted to circumvent the foregoing logic by invoking the generally applicable "illegality" defense recognized at common law in most States. The court reasoned that the NLRA confers a nonwaivable substantive right to invoke collective-litigation procedures, making it "illegal" to enforce a contract that waives the right and thereby triggering the saving clause. That reasoning does not withstand scrutiny. For purposes of an "illegality" defense, the relevant public policy is that of the State. State public policy does not automatically embody federal public policy, and a State need not adopt federal public policy as its own. And if a State adopted a public policy of prohibiting agreements that require employees to arbitrate claims on an individual basis, that state law would be preempted by the Arbitration Act.

If the court of appeals were correct that state-law "illegality" defenses incorporate the policies of every federal statute, a litigant could circumvent the requirement of a clear congressional command simply by asserting that it would be "illegal" to enforce a contract that contravenes a federal statute. Such an approach would turn the saving clause against the Arbitration Act itself and would eviscerate the framework established by this

Court for analyzing conflicts between the Arbitration Act and other federal statutes.

B. Even if the saving clause applied, there is no nonwaivable substantive right to collective-litigation procedures at issue here. As an initial matter, this case does not involve any substantive rights under the NLRA. The rights respondents seek to vindicate arise under the Fair Labor Standards Act and California state law, and respondents can fully vindicate those rights in individual arbitration.

Respondents assert, however, that the NLRA confers on employees a right to invoke class or other collective procedures in litigating their non-NLRA rights. To state the obvious, the right to class or other collective procedures is a procedural right, not a substantive one. And a right to collective procedures can be waived.

In any event, the court of appeals erred in construing the NLRA to confer a nonwaivable right to invoke class or other collective procedures in dispute resolution between employees and employers. Both the text of Section 7, which guarantees a right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and its context counsel against that interpretation. As for the text, "concerted activities" do not include activities in which an individual acts alone, such as an opt-out class action. And this litigation does not concern "mutual" rights, but rather employees' individual causes of action under the FLSA and California law. As for the context, the clause upon which respondents rely is a residual clause that must be construed in a manner consistent with the more specific words preceding it. That context demonstrates that the residual clause protects concerted activities such as the enumerated activities of self-organization and collective bargaining; it does not reach into the courtroom

to protect particular procedures by which non-NLRA claims are adjudicated.

Even if Section 7 did confer a right to invoke class or other collective procedures, that right would be waivable. Employers and employees are free to negotiate terms limiting the methods by which employees exercise their collectively bargained rights. Rights that are not central to the collective-bargaining process are not absolute and can be waived in a collective-bargaining agreement. Any right to invoke class or other collective procedures for dispute resolution falls in the category of waivable rights. And where no union exists, employees are not precluded from waiving their own procedural rights. That conclusion is consistent with the presumption that an individual may waive legal protections intended for his or her benefit, absent an affirmative indication by Congress to the contrary.

C. Finally, the NLRB is not entitled to deference regarding the interplay between the Arbitration Act and the NLRA. This case does not present a question concerning the best interpretation of Section 7 when arbitration is not at issue, but rather a question concerning the reconciliation of the Arbitration Act and the NLRA. The NLRB does not administer the Arbitration Act. Nor can it supply, by virtue of its interpretation of the NLRA, the contrary *congressional* command necessary to override the Arbitration Act. The question whether such a congressional command exists is one for this Court to answer. Because there is no irreconcilable conflict between the Arbitration Act and the NLRA, the Arbitration Act's mandate that arbitration provisions are to be enforced according to their terms should be given effect, and the agreements at issue here enforced.

ARGUMENT

I. EMPLOYMENT AGREEMENTS REQUIRING THE PARTIES TO ARBITRATE ON AN INDIVIDUAL BASIS ARE ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT

This case involves an alleged conflict between the Federal Arbitration Act and another federal statute. The Court has faced similar conflicts many times before, and it has consistently held that the Arbitration Act applies unless the other federal statute contains a "congressional command" "contrary" to arbitration according to the terms of the parties' agreement. Such a command must be "clearly" observable in the statute's text, legislative history, or underlying purposes that inherently conflict with arbitration.

To avoid arbitration according to the terms of their agreement with petitioners, therefore, respondents must demonstrate that the National Labor Relations Act is irreconcilable with the Arbitration Act because the NLRA contains a clear command that is contrary to the Arbitration Act's command to enforce arbitration agreements according to their terms. They cannot make that showing; indeed, in holding that the arbitration provision at issue was unenforceable, the Ninth Circuit did not even try. Nothing in the NLRA's text, legislative history, or purposes clearly evinces a congressional intent to preclude arbitration generally or to preclude individual arbitration specifically. Respondents' arbitration provision is therefore enforceable under the Arbitration Act. The Ninth Circuit erred in concluding otherwise, and its judgment should be reversed.

A. A Federal Statute Cannot Override The Arbitration Act's Clear Command To Enforce Arbitration Agreements According To Their Terms Unless It Contains A Clear Contrary Command

1. As this Court has repeatedly noted, the Arbitration Act embodies a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Section 2 of the Arbitration Act provides that "[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

Section 2 "reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010). Consistent with that principle, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks, citations, and brackets omitted).

"Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987). When two federal statutes allegedly conflict, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary," to harmonize the statutes if they are "capable of co-existence." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); see *United States* v. *Estate of Romani*, 523 U.S.

517, 530-532 (1998). A merely "plausible" conflict between the statutes will not suffice to prevent harmonization. *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 868-869 (1983).

Only when the two statutes are in "irreconcilable conflict" or when the later-enacted statute "covers the whole subject of the earlier one and is clearly intended as a substitute" will courts find that one statute impliedly repeals another. *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (internal quotation marks and citation omitted). And because "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change," *United States* v. *Fausto*, 484 U.S. 439, 453 (1988), "repeals by implication are not favored." *Branch*, 538 U.S. at 273 (internal quotation marks and citation omitted).

In the specific context of the Arbitration Act, this Court has synthesized those principles into a rule that the Arbitration Act's clear command to enforce arbitration provisions according to their terms will yield only when it has been "overridden by a contrary congressional command" in another federal statute. *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012) (internal quotation marks and citation omitted). The party resisting enforcement of an arbitration provision bears the burden of showing that "Congress intended to preclude a waiver of a judicial forum" or the other terms waived in the agreement. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Congress must demonstrate such an intention with "clarity." *CompuCredit*, 565 U.S. at 103. And consistent with that standard, "any doubts * * * should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25; see *CompuCredit*, 565 U.S. at 109 (Sotomayor, J., concurring in the judgment).

2. As this Court's decisions demonstrate, the burden of proving that a federal statute displaces the Arbitration Act is a heavy one. Indeed, where the statute in question does not expressly prohibit arbitration, the Court has uniformly rejected litigants' attempts to invoke another federal statute to displace the Arbitration Act. See, *e.g.*, *Italian Colors*, 133 S. Ct. at 2309-2312 (Sherman Act); *CompuCredit*, 565 U.S. at 99-105 (Credit Repair Organizations Act); *Green Tree Financial Corp.* v. *Randolph*, 531 U.S. 79, 90-92 (2000) (Truth in Lending Act); *Gilmer*, 500 U.S. at 26-33 (Age Discrimination in Employment Act); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 480-484 (1989) (Securities Act of 1933, overruling *Wilko* v. *Swan*, 346 U.S. 427 (1953)); *McMahon*, 482 U.S. at 227-242 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-639 (1985) (Sherman Act); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-521 (1974) (Securities Exchange Act of 1934).

a. Three of the Court's decisions are particularly instructive. To begin with, take the decision in *CompuCredit*. The plaintiffs there filed a putative class action against their credit-card issuer under the Credit Repair Organizations Act (CROA), 15 U.S.C. 1679-1679j, and the issuer moved to compel arbitration in accordance with the plaintiffs' credit-card agreements. See 565 U.S. at 96-97.

In response, the plaintiffs argued that the CROA prohibited the arbitration of claims arising under its provisions. See 565 U.S. at 98-103. To support that view, the plaintiffs pointed to three of the CROA's provisions. One of the statute's provisions required credit-card issuers to include the following statement in contracts with

their customers: "You have a right to sue a credit repair organization that violates the [CROA]." 15 U.S.C. 1679c(a). A second provision, setting out the CROA's civil cause of action, specifically and repeatedly used the terms "court," "action," and "class action," arguably suggesting that the "right to sue" described in the first provision includes a right to bring a civil action in court. 15 U.S.C. 1679g. And a third provision stated that "[a]ny waiver by any consumer of any [of the CROA's] protection[s]" was "void" and "may not be enforced." 15 U.S.C. 1679f(a).

This Court nevertheless held that the CROA did not contain the requisite congressional command and thus did not prohibit the arbitration of claims arising under its provisions. See *CompuCredit*, 565 U.S. at 103-104. The Court noted that the CROA was "silent" on arbitration and that nothing in the CROA created a "right to bring an action *in a court of law*." *Id.* at 99, 104 (emphasis added). Instead, the Court reasoned, the provisions the plaintiffs cited simply demonstrated that the CROA provided a "*guarantee of the legal power to impose liability*." *Id.* at 102.

If Congress meant to prohibit the arbitration of claims under the CROA, the Court continued, "it would have done so in a manner less obtuse than what [the plaintiffs] suggest[ed]." 565 U.S. at 103. Citing the following examples, the Court noted that, when Congress has "restricted the use of arbitration," it has done so with a "clarity that far exceeds the claimed indications in the CROA":

> "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."

> "Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy."

Id. at 103-104 (quoting 7 U.S.C. 26(n)(2) and 15 U.S.C. 1226(a)(2)). Because the CROA lacked that clarity, the Court held that it did not override the Arbitration Act and the arbitration provisions at issue were thus valid and enforceable. *Id.* at 104; see also *id.* at 108 (Sotomayor, J., concurring in the judgment) (agreeing that Congress did not "evince[] a contrary intent" in the CROA against enforcement of arbitration agreements).

b. The Court's decision in *McMahon* is to the same effect. Of particular relevance here, the Court addressed whether the civil-liability provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968, precluded the arbitration of claims arising under that statute. That provision stated that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains." 18 U.S.C. 1964(c).

Although the civil-liability provision specifically provided that an injured party may sue in court, the Court held that the provision did not "even arguably evince[] congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act." *McMahon*, 482 U.S. at 238. The Court added that there was no "hint in the[] legislative debates" to that effect, nor was there any "irreconcilable conflict" between the purposes of RICO's

civil-liability provision and the Arbitration Act. *Id.* at 238-239. To the contrary, the purpose of the civil-liability provision was "remedial," and arbitration would "adequately serve th[at] purpose[]." *Id.* at 240, 241.

c. Finally, consider the Court's decision in *Gilmer*. There, the plaintiff conceded that neither the text nor the legislative history of the statute at issue, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621-634, contained the requisite congressional command. See 500 U.S. at 26. Accordingly, the Court analyzed only whether the ADEA's "framework and purposes" conflicted with arbitration. *Id.* at 26-27.

In conducting its analysis, the Court accepted that the ADEA was designed to "further important social policies," whereas "arbitration focuses on specific disputes between the parties involved." 500 U.S. at 27. But the Court rejected the notion that the bilateral nature of arbitration created an "inherent inconsistency" with any statute designed to promote broader social goals. *Ibid.* Accordingly, the Court held that the Arbitration Act mandated enforcement of the arbitration provision—which contained a waiver of access to a collective-action mechanism identical to the one at issue here under the FLSA. See *id.* at 35.

d. Together, those decisions, and others like them, demonstrate that a party seeking to avoid arbitration based on a conflict between the Arbitration Act and another federal statute must show that Congress clearly intended for the other statute to displace the Arbitration Act. See *Mitsubishi Motors*, 473 U.S. at 628-640. It is not enough that a statute could be construed as conflicting with the Arbitration Act. See *CompuCredit*, 565 U.S. at 98-102; *McMahon*, 482 U.S. at 238-239. Nor will the Arbitration Act yield simply because the competing stat-

ute seeks to further a broad social policy. See *Gilmer*, 500 U.S. at 27.

Instead, only when a statute "evinces" a clear "congressional intent to exclude" the class of claims at issue "from the dictates of the Arbitration Act" will the Arbitration Act be displaced. *McMahon*, 482 U.S. at 238. Absent such a clear expression of intent, courts must give effect to the Arbitration Act's unambiguous mandate to enforce arbitration provisions according to their terms. See, *e.g.*, *CompuCredit*, 565 U.S. at 104.

B. The NLRA Does Not Contain A Clear Contrary Command To Override The Arbitration Act

Respondents agreed to arbitrate all employment disputes with EY on an individual, rather than collective, basis. They now maintain that EY cannot enforce the arbitration provision because the NLRA guarantees them a nonwaivable right to pursue collective litigation. In other words, respondents allege a conflict between the Arbitration Act, which requires enforcement of arbitration provisions according to their terms, and the NLRA.

Accordingly, respondents bear the burden of showing a clear contrary command in "the text of the [NLRA], its legislative history, or an inherent conflict between [individual] arbitration and the [NLRA's] underlying purposes." *Gilmer*, 500 U.S. at 26 (internal quotation marks and citation omitted). Because respondents cannot show that Congress intended in the NLRA to preclude agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically, there is no irreconcilable conflict between the statutes, and the parties' agreement must be enforced.

1. Nothing in the text of the NLRA evinces a congressional command contrary to agreements to arbi-

trate, much less agreements to arbitrate on an individual basis. The key section respondents invoke, Section 7, provides in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. That provision contains no language guaranteeing the availability of a judicial forum in disputes between employers and employees. Nor does it contain any reference to class or other collective dispute-resolution procedures. And it does not even refer to arbitration.

Indeed, no provision in the entire NLRA guarantees the availability of a judicial forum or collective dispute-resolution procedures in disputes between employers and employees. Nor does the NLRA mention arbitration at all, aside from acknowledging that an employee may request that his union "use the grievance-arbitration procedure on the employee's behalf." 29 U.S.C. 169.

In particular, respondents rely on Section 7's residual clause, which gives employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. But the general language of that residual clause does not come close to doing the "heavy lifting" required to evince a clear intent to preclude individual arbitration. *CompuCredit*, 565 U.S. at 100. The clause is most naturally understood to be of a piece with the list of specific rights that it follows. That list, in turn, concerns self-organization and collective bargaining. See 29 U.S.C. 157. "Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific

words." *Yates* v. *United States*, 135 S. Ct. 1074, 1086 (2015) (brackets omitted).

Even if it were "plausible" to read the broad language of the residual clause as encompassing a right for employees to pursue individualized employment claims collectively, that would not be enough. See *American Bank & Trust Co.*, 463 U.S. at 868-873. It would mean only that Section 7 is ambiguous on the relevant point. And it should go without saying that an ambiguous statute cannot provide the requisite clear congressional command to displace the Arbitration Act. In any event, ambiguous statutes should be "construe[d] * * * to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law"—not to create statutory conflicts when alternative interpretations are available. *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 100 (1991).

In fact, this Court has addressed much clearer language than Section 7's and found no contrary congressional command. Although the CROA contains an express right to file suit in federal court, this Court held in *CompuCredit* that the statute was insufficient to "establish the contrary congressional command overriding the [Arbitration Act]." 565 U.S. at 100-101 (internal quotation marks and citation omitted). Similarly, in *Gilmer*, the Court "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." *Italian Colors*, 133 S. Ct. at 2311 (discussing *Gilmer*). Section 7 does not contain anything close to the express language used in the CROA or the ADEA, and it thus falls far short of providing the clear command necessary to supersede the Arbitration Act.

2. The legislative history of the NLRA also does not evince a congressional intent to preclude agreements to arbitrate, much less agreements to arbitrate on an individual basis. To the extent there was discussion of arbitration in the legislative history of the NLRA, it was primarily in the context of a proposal to have the NLRB *conduct* arbitrations. See S. 1958, 74th Cong., 1st Sess. § 12 (introduced Feb. 21, 1935). There was no "discuss[ion] [of] the right to file class or consolidated claims against employers" at all. *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 361 (5th Cir. 2013). That is hardly surprising, since the NLRA was enacted decades before Federal Rule of Civil Procedure 23, which created the modern class action, see Pet. App. 37a, and years before the FLSA, which contains its own collective-action mechanism, see 29 U.S.C. 216(b).

There is thus no indication that, when Congress enacted the NLRA, it was concerned about protecting the ability to invoke class or other collective procedures when pursuing claims arising under other statutes. The silence of the legislative history further confirms that Congress did not intend in the NLRA to override the Arbitration Act's command to enforce arbitration provisions according to their terms.

3. In addition, individual arbitration does not inherently conflict with the underlying purposes of the NLRA such that a congressional intent to displace the Arbitration Act might be inferred. The stated purpose of the NLRA was to minimize industrial strife by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. 151.

Consistent with that statutory purpose, the clear focus of the NLRA is on collective bargaining. Provisions of the NLRA create a right to self-organization, 29 U.S.C. 157; set limits on employers' and unions' behavior, 29 U.S.C. 158; and estab. sh a government agency intended to oversee relations between employers and unions, 29 U.S.C. 153, 160. As the Court has observed, to the extent the NLRA protects employees' rights, it does so "not for their own sake but as an instrument of the national labor policy" of "encouraging the practice and procedure of collective bargaining." *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 62 (1975).

The NLRA is hardly hostile to arbitration, moreover, as federal labor policy has long favored and promoted arbitration in the collective-bargaining process, as this Court has recognized for decades (including in cases where it was the employer that resisted arbitration). See, *e.g.*, *Nolde Bros.* v. *Bakery Workers*, 430 U.S. 243, 254-255 (1977); *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 439 (1967); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The Court has repeatedly construed the NLRA to permit arbitration and to require enforcement of arbitration provisions in the context of collective-bargaining agreements. See, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257-258 (2009); *Nolde Bros.*, 430 U.S. at 253-255.

Nor is the NLRA's policy of promoting collective bargaining at odds with the concept of *individual* arbitration. Although individual arbitration "focuses on specific disputes between the parties involved," it "nevertheless also can further broader social purposes." *Gilmer*, 500 U.S. at 27-28. Accordingly, while this Court has considered numerous statutes "designed to advance important public policies," it has consistently held that

"claims under those statutes are appropriate for arbitration." *Id.* at 28.

So too here. In upholding the validity of arbitration provisions in employment agreements, this Court has rejected the proposition that "the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001). Those now-familiar advantages include the use of "efficient, streamlined procedures" that "reduc[e] the cost and increas[e] the speed of dispute resolution." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344, 345 (2011). If anything, those advantages may be "of particular importance" in the context of employment litigation, which "often involves smaller sums of money than disputes concerning commercial contracts," *Circuit City*, 532 U.S. at 123.

Regardless of the existence of an arbitration provision, moreover, the NLRB retains the authority to issue a complaint against an employer that engages in unfair labor practices and to prosecute that complaint or to facilitate a settlement between the parties. See NLRB, *What We Do—Investigate Charges* <tinyurl.com/nlrb-charges> (last visited June 9, 2017). The arbitration provision at issue here also preserves an employee's right to file a charge with the Equal Employment Opportunity Commission or any other administrative agency. J.A. 47.

Put simply, nothing suggests that the underlying purposes of the NLRA are irreconcilable with individual arbitration. Indeed, it is difficult to fathom how there could be an *inherent* conflict between the purposes of the NLRA and individual arbitration when the procedures the NLRA allegedly protects—class actions under Rule 23 and collective actions under the FLSA—did not even exist when the NLRA was enacted. See p. 29, *supra*.

Arbitration has been, and continues to be, a common feature of federal labor relations under the NLRA. There is no valid reason to believe that individual arbitration gives rise to an inherent conflict with the purposes of the NLRA so as to supersede the Arbitration Act's clear mandate to enforce arbitration provisions according to their terms.

* * * * *

The burden is on respondents to show that Congress intended in the NLRA to supersede the Arbitration Act, and they cannot carry it. Neither the text, legislative history, nor the underlying purposes of the NLRA reveal anything even approaching a clear congressional command precluding agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically. Pursuant to the Arbitration Act, therefore, the arbitration provision at issue here should be enforced. The court of appeals' contrary holding was erroneous.

II. NOTHING IN THE ARBITRATION ACT'S SAVING CLAUSE OR THE NLRA DICTATES A DIFFERENT CONCLUSION

The few courts of appeals to have held that employment agreements requiring the parties to arbitrate on an individual basis are unenforceable have relied on a misreading both of the Arbitration Act's saving clause and of the NLRA itself. The saving clause permits courts to withhold enforcement of an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. According to the court of appeals here, any attempt to waive collective-litigation procedures was illegal under Section 7 of the NLRA and thus unenforceable under the saving clause. See Pet. App. 14a.

That reasoning is deeply flawed. The Arbitration Act's saving clause applies to generally applicable doctrines of contract law (mainly state contract law). It has no purchase where, as here, the claim is that another federal statute supersedes the Arbitration Act. And even if it were otherwise, the NLRA does not confer a nonwaivable substantive right to invoke class or other collective procedures. The court of appeals reached the wrong result, and it did so by employing the wrong methodology. Its judgment should be reversed.

A. The Arbitration Act's Saving Clause Does Not Apply Where Another Federal Statute Is Alleged To Prohibit Or Limit Arbitration

1. Section 2 of the Arbitration Act provides that an arbitration provision shall be valid or enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. By its terms, the saving clause refers to "grounds * * * for the revocation of any contract": that is, to generally applicable doctrines of contract law. See *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421, 1426 (2017). With rare exception, the substance of contract law is supplied by state law, rather than federal law. See *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, this Court has described the saving clause as a "choice-of-law" provision for "choosing between state-law principles [of contract law] and the principles of federal * * * law envisioned by [the Arbitration Act]." *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

As the Court has explained, the saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mo-*

bility, 563 U.S. at 339 (quoting *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)); see also *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 n.11 (1984) (rejecting application of the saving clause to a law that did not provide a ground for "revocation of *any* contract," but rather only of contracts pertaining to a certain subject). A doctrine of state law that applies equally to "any contract" will therefore be "saved" by the saving clause, but a state law that discriminates against arbitration will be preempted because it conflicts with the substantive provisions of the Arbitration Act. See *Perry*, 482 U.S. at 491-492 & n.9; *Kindred Nursing*, 137 S. Ct. at 1426 (explaining that the saving clause "preempts any state rule discriminating * * * against arbitration").

By its terms, therefore, the saving clause does not apply where another federal statute allegedly discriminates against arbitration. Unlike the States, Congress is free to enact laws that discriminate against arbitration. When it does so, however, it is governed by the principles discussed above: Congress must clearly evince its intent to displace the Arbitration Act's command to enforce arbitration provisions according to their terms. Not surprisingly, in articulating that standard time and again, this Court has never suggested that the saving clause has any bearing on the analysis. See, *e.g.*, *CompuCredit*, 565 U.S. at 99-105; *Gilmer*, 500 U.S. at 26-33; *McMahon*, 482 U.S. at 227-242.

2. The court of appeals attempted to circumvent the foregoing reasoning in a manner reminiscent of the "great variety" of "devices and formulas" "declaring arbitration against public policy" that prompted the enactment of the Arbitration Act in the first place. *AT&T Mobility*, 563 U.S. at 342 (internal quotation marks and citation omitted). The court noted that the common law of most States provides a generally applicable "illegality"

defense that precludes the enforcement of contracts that violate public policy. Pet. App. 14a; see, *e.g.*, *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29, 42 (1987). If the NLRA confers a nonwaivable substantive right to invoke class or other collective procedures, the court reasoned, it would be "illegal" to enforce a contract that waives that right, and the saving clause would therefore be triggered. Pet. App. 11a, 14a.

That argument is unavailing. To begin with, when assessing an "illegality" defense to contract enforcement under state law, the relevant public policy is that of the *State*. See, *e.g.*, *Vidal* v. *Girard's Executors*, 43 U.S. (2 How.) 127, 197 (1844). "It is for the [S]tate to say whether a contract * * * is so offensive to its view of public welfare as to require its courts to close their doors to its enforcement." *Griffin* v. *McCoach*, 313 U.S. 498, 507 (1941). Accordingly, in cases arising under diversity jurisdiction, federal courts typically analyze state public policy, not federal policy, when illegality defenses are raised. See 5 Richard A. Lord, *Williston on Contracts* § 12:1, at 755-756 & nn.20-21 (4th ed. 2009) (compiling cases). While state public policy may mirror federal policy, it does not automatically embody it; a State is free to pursue its own public-policy goals, subject only to preemption by conflicting federal law. And if the relevant *State* adopted a public policy of prohibiting agreements that require employees to arbitrate claims on an individual basis, that state law would be preempted by the Arbitration Act. See, *e.g.*, *AT&T Mobility*, 563 U.S. at 343-344.

A contrary understanding would circumvent the inapplicability of the saving clause to other federal statutes and would gut the ordinarily applicable framework for analyzing conflicts between two federal statutes. As discussed above, "it is the duty of the courts" to harmonize

two statutes alleged to be in conflict if they are "capable of co-existence." *Morton*, 417 U.S. at 551; see *Estate of Romani*, 523 U.S. at 530-532. In the absence of "a clearly expressed congressional intention" for one statute to supersede another, therefore, courts will find an implied repeal only when the two statutes are in "irreconcilable conflict" or when the later-enacted statute "covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch*, 538 U.S. at 273 (internal quotation marks and citation omitted). That is why the Court has adopted and repeatedly applied a rule that the Arbitration Act's command to enforce arbitration provisions according to their terms will yield only when it has been "overridden by a contrary congressional command" in another federal statute. *CompuCredit*, 565 U.S. at 98 (internal quotation marks and citation omitted).

But if the Ninth Circuit were correct about state-law "illegality" defenses, a party could always circumvent the requirement of a clear congressional command by repackaging an allegation that another federal statute conflicts with the Arbitration Act as an allegation that it would be "illegal" (and thus impermissible under the saving clause) to enforce a contract that contravenes the other statute. That cannot be what Congress intended when it included the saving clause in the Arbitration Act. Cf. *Kindred Nursing*, 137 S. Ct. at 1428 (rejecting an interpretation of the Arbitration Act that "would make it trivially easy * * * to undermine the Act"); *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 228 (1998) (reasoning, when interpreting a saving clause, that "the act cannot be held to destroy itself" (internal quotation marks and citation omitted)).

* * * * *

In short, the Arbitration Act's saving clause has no bearing on the correct analysis here. Because the NLRA does not contain a clear congressional command precluding agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically, the parties' agreement must be enforced according to its terms. That is all the Court need decide in order to resolve the question presented. As we will now explain, however, it would be erroneous to conclude, even without reference to the requirement of a clear congressional command, that the NLRA confers a nonwaivable substantive right to invoke class or other collective procedures.

B. The NLRA Does Not Create A Nonwaivable Substantive Right To Collective-Litigation Procedures

The court of appeals concluded that the arbitration provision at issue here was "illegal" because it waived respondents' "substantive" rights under the NLRA. See Pet. App. 14a-15a. Specifically, the court construed the NLRA to confer a nonwaivable substantive right on employees to invoke class or other collective procedures in dispute resolution with their employers, whether in court or in arbitration. See *id.* at 16a-17a. That is incorrect. Accordingly, even if the saving clause applied here—and it does not—the judgment of the court of appeals should be reversed.

1. a. As a threshold matter, no substantive rights under the NLRA are at issue here. The substantive rights respondents seek to vindicate are asserted rights to back pay under the Fair Labor Standards Act and California state law. See J.A. 27-34. Respondents in no way waived *those* rights when they agreed to submit those claims to individual arbitration. Indeed, this Court

has expressly distinguished between "employees' substantive right[s]" and "the procedures available under [Section 7] for securing these rights," cautioning that the two should not be "confuse[d]." *Emporium Capwell*, 420 U.S. at 69.

In addition, respondents no longer argue that the arbitration provision at issue here somehow prevents them from *effectively* vindicating their underlying rights (which this Court has suggested, though never held, could lead to the invalidation of an arbitration provision). See *Italian Colors*, 133 S. Ct. at 2310; *Mitsubishi Motors*, 473 U.S. at 637 & n.19; see generally *Italian Colors*, 133 S. Ct. at 2313, 2315 (Kagan, J., dissenting) (suggesting that the effective-vindication doctrine applies when an arbitration provision "operates to confer immunity from potentially meritorious federal claims" by "foreclos[ing] (not diminish[ing]) a plaintiff's opportunity to gain relief for a statutory violation"). The arbitration provision at issue does not foreclose respondents in any way from gaining relief for the alleged statutory violations; it merely requires that the relief be sought in individual arbitration.

b. Respondents nevertheless claim that another statute—the NLRA—confers a right on employees to invoke class or other collective *procedures*. But as the last sentence reflects, that is the very definition of a procedural right, not a substantive one. After all, "[a] class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Insurance Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). "And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Ibid.*

Thus, while Federal Rule of Civil Procedure 23 provides a "right" to class litigation if certain prerequisites are met, see, *e.g.*, *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 613-616 (1997), the right "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 332 (1980). That explains why Rule 23 satisfies the Rules Enabling Act and need not yield to conflicting state law under *Erie*. See *Shady Grove*, 559 U.S. at 406-410 (plurality opinion); *id.* at 429-436 (Stevens, J., concurring in the judgment). It also explains why a party can waive access to class procedures under Rule 23 in an arbitration provision, even if doing so renders some claims economically irrational to pursue. See *Italian Colors*, 133 S. Ct. at 2309, 2311.

The same analysis applies to other types of collective litigation, such as the "opt-in" collective-action mechanism of the FLSA. See 29 U.S.C. 216(b). Indeed, the ADEA expressly incorporates that collective-action mechanism, see 29 U.S.C. 626(b), and this Court has held that access to that mechanism can be waived in an arbitration provision without in any way suggesting that the right to invoke that mechanism is a substantive one. See *Gilmer*, 500 U.S. at 32; cf. *Italian Colors*, 133 S. Ct. at 2311 (discussing *Gilmer*).

Contrary to the court of appeals' reasoning, therefore, the fact that a statute confers a right to invoke class or other collective procedures indicates the existence only of a procedural right, which can be waived. See Pet. App. 15a. Such statutory rights "provide[] an opportunity to proceed collectively, not an invitation to plaintiffs that they could not refuse." *Nicholson* v. *CPC International Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting) (internal quotation marks and citation omitted); see *Gilmer*, 500 U.S. at 32 (citing Judge Becker's

opinion in *Nicholson* with approval). Because a waiver of the right to invoke collective-litigation procedures "merely limits arbitration to the two contracting parties" and does not "eliminate[] those parties' right to pursue their statutory remedy," *Italian Colors*, 133 S. Ct. at 2311, it is not somehow inherently invalid under the Arbitration Act. Conversely, under the Arbitration Act, parties have broad discretion to structure the procedures by which they may resolve their disputes—including whether to permit class arbitration. See *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 683-684 (2010). The procedural nature of the right at issue resolves the matter.

2. To the extent that the court of appeals construed the NLRA to confer a nonwaivable right on employees to invoke class or other collective procedures in dispute resolution with their employers, see Pet. App. 16a-17a, it was mistaken. It bears repeating that the correct inquiry here is whether the NLRA contains a *clear command* precluding agreements to arbitrate on an individual basis—and, for the reasons discussed above, it plainly does not. See pp. 26-32. In any event, the NLRA does not confer a right to invoke class or other collective procedures; even if it did, there is no reason to believe that it renders any such right nonwaivable.

a. To reiterate, Section 7 of the NLRA provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. That language does not specifically confer any right on employees to pursue actions against their employers in court, nor does it say anything about class or other collective proce-

dures—much less does it elevate those procedures to the status of a nonwaivable substantive right. And even without the requirement of a clear command, there is no valid justification for concluding that the general right to engage in "concerted activities for * * * mutual aid or protection" encompasses the "right to resolve disputes using a particular legal procedure." Pet. App. 37a (Ikuta, J., dissenting).

In fact, the text and context of Section 7 decisively counsel against such a conclusion. As to the text: the NLRB has long recognized that "concerted activities" do not include activities in which an individual acts alone, even when that individual's activity is directed toward an issue of general interest to other employees. See *NLRB* v. *City Disposal Systems Inc.*, 465 U.S. 822, 829 n.6 (1984) (citing *Meyers Industries, Inc.*, 268 N.L.R.B. 493 (1984)). A class action (or other type of collective action) may be initiated by an individual employee, and it may be litigated without the involvement of any other employee. See 16-307 Pet. App. 148a (Member Johnson, dissenting). Indeed, at least as to an opt-out class action, the very point of the procedure is to allow an individual to represent absent parties *without* their participation.

Employees, moreover, cannot agree on their own to use class or other collective dispute-resolution procedures. Instead, the judge (or arbitrator) must determine that the employees satisfy the prerequisites of the relevant rule. A plaintiff cannot proceed as a class representative unless the judge finds that the plaintiff has satisfied the requirements of Rule 23, and an FLSA case does not qualify as a "collective action" unless the judge finds that all employees are "similarly situated." 29 U.S.C. 216(b). Even basic joinder requires a determination that the claims being joined arose out of the same transaction. See Fed. R. Civ. P. 20(a). "It would make

little sense for the 'concertedness' of a litigation campaign to turn on judicial decisions over which workers have no control." *NLRB* v. *Alternative Entertainment, Inc.*, No. 16-1385, 2017 WL 2297620, at *15 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part).

But even if collective litigation did constitute "concerted activity," it would not constitute a "concerted activit[y] for * * * mutual aid or protection." This case well illustrates the point. Respondents are not pursuing "mutual" rights in any sense of the term. Instead, they are pursuing individual causes of action under the FLSA and California state law, seeking overtime pay to which they claim they are individually entitled.

While other EY employees may (or may not) be similarly situated, therefore, each respondent (and each purported class member) possesses his or her own cause of action under federal or state law, seeking his or her own individualized damages, even if those causes of action can be considered together in a single lawsuit through a collective-litigation mechanism. Again, there is no indication that, when Congress enacted the NLRA, it was concerned about protecting the ability to invoke class or other collective procedures when raising individualized employment claims arising under other statutes—especially because the procedures at issue in cases such as this one did not even exist at the time the NLRA was enacted. See p. 29, *supra*.

As to the context: the residual clause at issue here follows Section 7's core guarantees of the rights to organize and to engage in collective bargaining. As discussed above, familiar canons of construction dictate that the catch-all category of "other concerted activities for * * * mutual aid or protection" encompasses only ac-

tivities similar to the more specific guarantees that precede it. See pp. 27-28.

When considered in context, it is clear that Section 7's residual clause does not reach into the courtroom and "create an affirmative right to use or pursue [particular] procedures" to resolve an employee's claim against an employer. *Alternative Entertainment*, 2017 WL 229-7620, at *15 (Sutton, J., concurring in part and dissenting in part). While "mutual aid or protection" may be "somewhat broader" than the "narrower" protections for "self-organization" and "collective bargaining," *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565 (1978), collective-litigation procedures are still further removed. They do not go to the participatory rights at the heart of the NLRA or the underlying substantive rights over which the NLRA allows employers and employees to bargain. Instead, they merely provide the procedures by which disputes concerning those underlying rights are resolved. For that reason, employers and employees are free (whether through collective bargaining or otherwise) to negotiate terms such as whether employment disputes will be resolved through arbitration or litigation, or whether such disputes will be resolved individually or collectively.

However the residual clause may expand on Section 7's protection for the substantive self-organization and collective-bargaining rights of employees, therefore, it does not protect or prohibit particular procedures by which non-NLRA claims are adjudicated. See *Alternative Entertainment*, 2017 WL 2297620, at *15 (Sutton, J., concurring in part and dissenting in part) (noting that "the 'concertedness' of litigation does not turn on the particular procedural form that litigation takes"). Such a purpose would be entirely beyond, and indeed unlike, the rights protected by the remainder of Section 7. In fact,

the NLRA nowhere contemplates collective-litigation procedures as essential to its purposes—nor could it have, given that collective-litigation procedures of the type at issue here did not even exist at the time the NLRA was enacted. There is simply no indication that Section 7 confers on employees a right to invoke class or other collective procedures in dispute resolution with their employers.

In support of its construction of Section 7, the court of appeals cited this Court's decision in *Eastex* for the proposition that Section 7 protects the "right to 'seek to improve working conditions through resort to administrative and judicial forums.'" Pet. App. 7a (quoting 437 U.S. at 566). But *Eastex* cannot bear the weight the Ninth Circuit put on it. There, the Court expressly declined to address the question of "what may constitute 'concerted' activities in this context" (*i.e.*, in the context of litigation). 437 U.S. at 566 n.15; see Pet. App. 36a n.5 (Ikuta, J., dissenting).

Instead, the questions presented in *Eastex* were (1) whether distribution of a union newspaper was an activity protected by the NLRA and, (2) if so, how the fact that the distribution was to take place on the employer's property affected the analysis. See 437 U.S. at 563. The Court did not consider whether the NLRA confers a right to litigate against employers as a class; if it exists, when that right may be waived; or how the NLRA interacts with other federal statutes such as the Arbitration Act.

Nor would *Eastex* resolve the issue even if the Court had squarely held that Section 7 protects employees' rights to seek judicial relief in concert. That Section 7 might protect employees from adverse employment action after *filing* a lawsuit does not mean that it reaches into the courthouse and dictates how the litigation must

proceed. Indeed, the NLRB's General Counsel drew exactly that distinction in a 2010 guidance memorandum clarifying that an employer does not run afoul of Section 7 by moving to "enforce[]" the employee's agreement to arbitrate employment claims on an individual basis. See NLRB, General Counsel Mem. No. 10-06, at 2, 5-6 (June 16, 2010). Neither *Easter* nor any other decision of this Court speaks to the question whether Section 7 confers a right to proceed on a class or other collective basis once in court.

b. In any event, even if Section 7 did confer such a right, it would be waivable. As this Court has explained, "[t]he fact that an activity is concerted * * * does not necessarily mean that an employee can engage in the activity with impunity." *City Disposal Systems*, 465 U.S. at 837. Instead, "if an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, he is free to negotiate a provision in his collective-bargaining agreement that limits the availability of such methods." *Ibid.*

Thus, this Court has held that rights that are not central to the collective-bargaining process are not absolute and can be waived by unions on behalf of their members. For example, the Court and the NLRB have upheld a union's waiver of the right of its members to use particular methods, such as the right to engage in an economic strike, the right to picket, and even, in some circumstances, the right to ongoing collective bargaining through a "zipper" clause. See, *e.g.*, *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705-707 (1983); *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 105-106 (1962); *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, 79-80 (1953); *GTE Automatic Electric Inc.*, 261 N.L.R.B. 1491, 1491-1492 (1982).

Even assuming that Section 7 conferred a right to invoke class or other collective procedures, therefore, that right would be waivable. It would be anomalous for the NLRA to protect against waiver of a right to collective-litigation procedures for non-NLRA claims when the NLRA allows for waiver of rights as significant as the rights to strike and to picket in order to enforce collectively bargained rights. And because the alleged right at issue here has nothing to do with the terms of a collective-bargaining agreement, there is nothing odd about the notion that an individual, as opposed to only a union representative, would be able to waive that right.

Indeed, where, as here, no union has been formed, it would make no sense to preclude individual employees from waiving their procedural rights for themselves. Cf. *14 Penn Plaza*, 556 U.S. at 258 (noting that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative"); 29 U.S.C. 157 (giving employees "the right to refrain" from bargaining through a representative). Accordingly, employers and employees remain free to negotiate whether employment disputes will be resolved through arbitration or litigation, or whether such disputes will be resolved individually or collectively.

The principle that any right to invoke class or other collective procedures may be waived is consistent with the broader background principle that parties have a presumptive right to waive legal protections intended for their benefit. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-201 (1995). That presumption applies regardless of the source of the protections at issue—whether the Constitution, a statute, or the common law. See *ibid*; *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873). Relying on that presumption, the Court has permitted

the waiver of a wide variety of individual rights in both the civil and criminal contexts. See, *e.g.*, *Evans* v. *Jeff D.*, 475 U.S. 717, 730-732 (1986) (right to attorney's fees in Section 1983 actions); *Kearney* v. *Case*, 79 U.S. (12 Wall.) 275, 281 (1871) (Seventh Amendment right to jury trial); *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969) (Fifth Amendment privilege against compulsory self-incrimination, Sixth Amendment right to jury trial, and Sixth Amendment right to confront one's accusers); *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938) (Sixth Amendment right to counsel).

To be sure, the presumption in favor of waiver will yield if waiver is "inconsistent with the provision creating the right sought to be secured." *New York* v. *Hill*, 528 U.S. 110, 116 (2000). But in the statutory context, that generally requires some "affirmative indication of Congress' intent to preclude waiver." *Mezzanatto*, 513 U.S. at 201. The NLRA contains no such indication, either generally or with regard to any (unenumerated) right to invoke collective-litigation procedures specifically. Cf. 15 U.S.C. 1679f(a) (CROA provision explicitly prohibiting "[a]ny waiver by any consumer of any protection" provided by the statute). Quite to the contrary, holding that Section 7 precludes an employee from waiving class proceedings would "create[] a bizarre alchemy," because "[i]t would mean that Section 7 guarantees an employee the right to pursue a collective action" that the underlying statute (here, the FLSA) permits to be waived. *Alternative Entertainment*, 2017 WL 2297620, at *16 (Sutton, J., concurring in part and dissenting in part).

In sum, the NLRA does not confer a nonwaivable substantive right on employees to invoke class or other collective procedures in dispute resolution with their employers. And in any event, because the NLRA does

not contain a *clear command* to preclude agreements to arbitrate on an individual basis, and because enforcement of the arbitration provision at issue will not interfere with the vindication of respondents' underlying substantive rights, that provision should be enforced according to its terms under the Arbitration Act. See, *e.g.*, *CompuCredit*, 565 U.S. at 102; *Italian Colors*, 133 S. Ct. at 2318 (Kagan, J., dissenting).

C. The NLRB Is Not Entitled To Deference On The Interplay Between The Arbitration Act And The NLRA

Finally, the NLRB is not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in its assessment of how the provisions of the NLRA should be reconciled with the Arbitration Act. See Pet. App. 5a.

1. As a preliminary matter, the relevant inquiry here is not whether the NLRA can be construed *in vacuo* to confer a nonwaivable right to invoke class or other collective procedures, but rather how the Arbitration Act and the NLRA can be reconciled. The NLRB does not administer the Arbitration Act, and this Court has "never deferred to the [NLRB's] remedial preferences" when it comes to "federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 144 (2002).

In the specific context of the Arbitration Act, moreover, this Court has made clear that the Arbitration Act's command to enforce arbitration provisions according to their terms will yield only when it has been "overridden by a contrary *congressional* command" in another federal statute. *CompuCredit*, 565 U.S. at 98 (emphasis added) (internal quotation marks and citation omitted). The NLRB cannot supply the requisite clear "congressional command" by construing a purportedly ambiguous

statute. It is the Court's task to determine whether such a "congressional command" exists, and to resolve the interplay between the two statutes. In other words, once a potential conflict between the Arbitration Act and another federal statute has been identified, "the presumption against implied repeals sets in, and *Chevron* leaves the stage." *Alternative Entertainment*, 2017 WL 2297620, at *17 (Sutton, J., concurring in part and dissenting in part).

2. In any event, the NLRB's position that the NLRA confers a nonwaivable right to invoke class or other collective procedures is of only recent vintage. As noted above, see p. 45, the General Counsel issued a guidance memorandum in 2010 advising that an employer does *not* violate the NLRA by requiring "non-NLRA employment claims [to] be resolved" through individual arbitration, as long as employees can "challenge [arbitration] agreements through concerted activity" and "only individual rights are waived." NLRB, General Counsel Mem. No. 10-06, *supra*, at 2.

The NLRB abruptly reversed course in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). The NLRB began its analysis by noting that it had interpreted Section 7's protection of "concerted action" as encompassing some forms of collective litigation. *Id.* at 2278. The NLRB then proceeded to diverge from the guidance memorandum by concluding that, because Section 7 created a substantive right to engage in collective employment litigation, *any* attempt to waive that right would violate public policy and would thus be unenforceable under the Arbitration Act's saving clause. See *id.* at 2285-2288. And the NLRB went further in *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), when it stated that the "broad language of Section 7" constituted a congressional command contrary to individual arbitration. *Id.* at 9.

3. Even on its own terms, the NLRB's analysis suffers from a host of flaws, and it would not warrant deference even if deference were due. Section 7 unambiguously does not create a nonwaivable right to class or other collective procedures in employment-related disputes. See pp. 40-48, *supra*. But even if Section 7 were ambiguous, that is of no moment. This case does not present a question concerning the best interpretation of Section 7 when arbitration is not at issue. Instead, it presents the question whether Section 7 contains the requisite "congressional command" prohibiting or limiting arbitration. However it is construed by an agency, an ambiguous statute cannot provide the "clarity" necessary to override the Arbitration Act, because the statute and the Arbitration Act must be reconciled on their own terms. *CompuCredit*, 565 U.S. at 103; see pp. 48-49, *supra*.

Section 7 does not compel the conclusion that employees have a nonwaivable right to class or other collective procedures in employment-related disputes. And under the established principles this Court applies in cases involving claimed conflicts between the Arbitration Act and another federal statute, that is the end of the analysis. Because there is no irreconcilable conflict between the Arbitration Act and the NLRA, the Arbitration Act's mandate that arbitration provisions are to be enforced according to their terms should be given effect. The arbitration provision at issue here is valid, and the judgment of the court of appeals should therefore be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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